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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term 1953

No. 714

GEO. F. ALGER COMPANY of Detroit, Mich., a Michigan corporation, et al., *Appellants*,

v.

JOHN W. PECK, formerly Tax Commissioner, Department of Taxation, State of Ohio, and member of the Ohio Reciprocity Board functioning under Section 5728.15, Revised Code of Ohio, et al., *Appellees*.

APPELLANTS' REPLY BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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APPELLANTS' REPLY BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees agree with us that the issue presented on this appeal is whether "a plain, speedy and efficient remedy may be had in the courts" of Ohio, within the meaning of 28 U.S.C. Sec. 1341, in our attack on the constitutionality of the Ohio highway use tax statute. They move to dismiss or affirm, however, on the basis of arguments intended to show that the federal question raised on this appeal is not substantial. This brief is a reply to those arguments, which, in general, fall under the headings discussed below.

I. In determining whether the laws of Ohio provide "a plain, speedy and efficient remedy * * * in the courts" within the meaning of 28 U.S.C. Sec. 1341, the only applicable precedents are decisions dealing with the consideration by state administrative boards of questions as to the constitutionality of a state tax, and not decisions in cases where the constitutionality of the state tax could be attacked in an action at law to recover the tax after payment under protest.

Appellees begin their argument by citing *Kohn* v. *Central Distributing Co.*, 306 U.S. 531, and *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, along with a general reference to other cases holding that 28 U.S.C. Sec. 1341 bars federal jurisdiction of a suit to enjoin a state tax where under state law an action at law could be brought to recover the tax after it was paid under protest. The reference to these cases is entirely irrelevant, as appellees have never contended that an adequate remedy of this kind was available to us under Ohio law. On the contrary, their counsel admitted at the hearing before the three-judge court that an action to recover the tax after it is paid is an inadequate remedy in Ohio. This admission was fully warranted, for under Section 2723.05, Revised Code of Ohio, the judgment in such an action would run only to "such part [of the tax] as is at the time of such judgment or order unexpended and in the possession of the officer collecting the same * * *." Cf. *Adams County* v. *Northern Pac. Ry. Co.*, 115 F. 2d 768, 776 (C.C.A. 9, 1940), where the fact that the statutory refund action would be against insolvent counties, so that the judgment would result only in the issuance of uncollectible warrants, made it inadequate and therefore not "efficient" within the meaning of the statute. Also *Georgia R. Co.* v. *Redwine*, 342 U.S. 299, 303, where this Court held that a suit for refund applicable to only 15% of the taxes in controversy was not a "plain, speedy and efficient remedy."

A "plain, speedy and efficient remedy * * * *in the courts*" is also available where the state courts have jurisdiction to enjoin the collection of illegal taxes. E.g., *Phipps* v.

School Dist. of Pittsburgh, 111 F. 2d 393, 397 (C.C.A. 3, 1940). But equitable relief is barred in Ohio by Section 5703.38, Revised Code of Ohio, which prohibits injunctions staying any order, determination, or direction of the Department of Taxation, or any action of other state officials taken pursuant thereto.

Thus, while there are many cases sustaining the adequacy of legal or equitable remedies, they have no application here. Where one may bring an action at law to recover the tax after payment under protest, or may bring a suit in equity to enjoin the assessment or collection of an illegal tax, he is afforded a judicial remedy from the outset—a "*remedy • • • in the courts*"— as his action is brought *in a court of original jurisdiction*, a court with full authority to consider and decide all issues, including constitutional issues, which may be raised. The statutory procedure which is forced on appellants by the decision below is not of that character. On the contrary, it calls first for a review of an assessment by the Tax Commissioner, who made the assessment in the first instance, and then for an appeal from the reassessment to the Board of Tax Appeals. Both the Tax Commissioner and the Board of Tax Appeals are admitted to have no authority to declare a law unconstitutional. Only after these two fruitless steps have been taken does one get into a judicial forum, by taking an appeal to either the Supreme Court of Ohio or the appropriate Ohio Court of Appeals. *In either case one is in the anomalous position of being compelled to seek appellate review of a decision rendered in a forum which did not have original jurisdiction.*

In contrast to the *Kohn* and *Great Lakes Co.* cases cited by appellees, *Hillsborough* v. *Cromwell*, 326 U.S. 620, presents a factual situation more nearly analogous to the present case. There the remedy of an aggrieved taxpayer was an appeal to the state board of tax appeals. Decisions of this board were reviewable on certiorari by the state supreme court, with an appeal from that court to the court of

errors and appeals. In that case this Court held that the District Court had jurisdiction of a declaratory judgment action attacking the validity of certain tax assessments because "there was such uncertainty surrounding the adequacy of the state remedy * * *" (326 U.S. at 626). In reaching this conclusion this Court laid great stress on the fact that "the state board of tax appeals to which respondent might have appealed concededly has no right to pass on constitutional questions" (326 U.S. at 625). *That is precisely the situation we have here.* While the subsequent judicial review there differed in some respects from that available under the Ohio procedure, we submit that this limitation on the jurisdiction of the administrative tribunal is alone sufficient to require a holding that administrative review is not "a plain, speedy and efficient remedy * * * *in the courts" of Ohio.*

II. The phrase, "plain, speedy and efficient remedy * * * in the courts of such State," as used in 28 U.S.C. Sec. 1341, means a remedy available at the very outset of the controversy in a court of law or equity, and it does not include a procedure calling for successive reviews before an administrative officer and an administrative board, neither of which has jurisdiction to pass on the basic issue in the controversy, with a subsequent review of their decision by a court having only appellate jurisdiction.

Appellees misapprehend the burden of our argument when they say we insist "that a state remedy is not adequate unless it permits recourse in the first instance to a court which can extend injunctive relief against the operation of the challenged tax." Rather, we maintain that an adequate remedy must permit recourse in the first instance to a court of original jurisdiction which has full authority to pass on every issue raised. Indeed, as we pointed out in our Jurisdictional Statement, if the court does not have such full authority the proceeding before it is not even a "remedy", for a lack of jurisdiction to decide an essential issue in the case prevents the court from enforcing the right or redressing the injury. Moreover, due

process of law under the Fourteenth Amendment requires "a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; * * *." *Pennoyer* v. *Neff*, 95 U.S. 714, 733.

The construction of Section 1341 which we urge is proper on a literal reading of that statute, and there is no justifiable basis for giving this language anything other than a literal interpretation. *A comparison of Section 1341 with the similar provisions of 28 U.S.C. Sec. 1342 prohibiting injunctions against any order "made by a State administrative agency" where, among other things, a "plain, speedy and efficient remedy may be had in the courts of such State" demonstrates that Congress referred expressly to "a State administrative agency" when it had such an agency in mind, in the same statute in which it referred to a remedy "in the courts of such State."* Both these sections are based on Section 41(1), Title 28, U.S.C. 1940 Ed. *In the circumstances, the only reasonable conclusion is that by "the courts of such State" Congress meant only judicial tribunals, and did not include administrative tribunals in that term.*

Significantly, Sec. 41(1) of the former Title 28, on which both Secs. 1341 and 1342 of the present Title 28 are based, provided that the remedy necessary to deprive the District Courts of jurisdiction of the specified classes of injunction proceedings was a remedy "at law or in equity in the courts of such State." Section 41(1) also defined the jurisdiction of the District Courts as including "all suits of a civil nature, at common law or in equity" in certain general classes. The various enactments going to make up Section 41(1) are, of course, *in pari materia*, and must be construed together. Obviously Congress in using the phrase "at common law or in equity" in defining the jurisdiction of the District Courts, and the virtually identical phrase "at law or in equity" in the provision taking away a part of that jurisdiction, must have had in mind in each instance the same concept—a judicial proceeding. The Reviser's Notes

indicate that the phrase "at law or in equity" was omitted as unnecessary in the formulation of the present Section 1341, an action which is consistent only with the view that the section refers to the courts in the commonly-accepted sense of the term. The terms "at law or in equity" from their very nature refer only to courts; they are inappropriate in connection with administrative tribunals.

A comparison of Sections 41(1) and 379 of the former Title 28 (now Sections 1341 and 2283, Title 28, United States Code) also indicates that "the courts of such State" as used in the former does not include state administrative tribunals. Section 379 provided that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State", with an exception not here material. The term "any court of a State" was held by this Court (in construing R.S. § 720, from which Section 379 was derived) not to include a mere administrative agency of the State. *Mississippi R.R. Com.* v. *Illinois Cent. R.R.*, 203 U.S. 335, 341. *It is illogical to say that Congress intended the same term in Section 41 (1) to have a different meaning.*

This case involves the application to a new situation of old and familiar equitable principles, for in *Hillsborough* v. *Cromwell*, 326 U.S. 620, 622-623, this Court pointed out that Section 41(1) of the former Title 28 was a recognition and sanction by Congress of the practice of the federal equity courts in cases where they were asked to enjoin the collection of a state tax to give peculiar force to Section 267, Judicial Code, which provided that suits in equity shall not be sustained in the federal courts "in any case where a plain, adequate, and complete remedy may be had at law." This statute was of course merely declaratory, making no change whatever in the rules of equity on the subject of legal remedy. *Boyce* v. *Grundy*, 3 Pet. 210, 215. In the *Hillsborough* opinion this Court also quoted (326 U.S. at 629) from *Greene* v. *Louisville & I.R. Co.*, 244 U.S. 499, 520, "A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire

case made by the bill in equity." The remedy which is forced on appellants by the decision below does not meet this requirement, for the Tax Commissioner and the Board of Tax Appeals admittedly do not have authority to declare the highway use tax statute unconstitutional. Since this issue as to constitutionality is at the heart of the complaint in this action, the state administrative procedure does not cover the entire case made by the complaint. Therefore it is not equivalent to an adequate remedy at law under the old equity rule, and for the same reason it cannot be "a plain, speedy and efficient remedy * * * *in the courts*" under the present Section 1341.

III. The doctrine requiring exhaustion of administrative remedy before seeking judicial relief is not applicable here.

Appellees, citing *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, and *Petroleum Exploration, Inc.* v. *Public Service Comm.*, 304 U.S. 209, appear to contend that the review by the Tax Commissioner and the Board of Tax Appeals is an administrative remedy which must be exhausted before judicial relief may be sought.

The short answer to this contention is that a taxpayer is not required to go through the futile steps of applying to state administrative authorities for relief from an unconstitutional tax before applying to the federal court for injunctive relief, as the administrative authorities cannot do otherwise than assume the validity of the statute. *Buder* v. *First Nat. Bank*, 16 F. 2d 990, 992-993 (C.C.A. 8, 1927), certiorari denied, 274 U.S. 743; *Southern Boulevard R. Co.* v. *City of New York*, 86 F. 2d 633, 634-635 (C.C.A. 2, 1936), certiorari denied, 301 U.S. 703; cf. *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562; *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 454-455. To require administrative review as a prerequisite to application for judicial relief in a case of this kind, where the administrative agencies are admittedly powerless to give the relief sought, would exalt form over substance. In such circumstances administrative review would be a mere shibboleth, meaningless

of itself, useful only to gain access to judicial relief. Neither the *Myers* nor the *Petroleum Exploration* decision imposes such a senseless requirement on a litigant.

However applicable the *Myers* case may have been on the question whether appellants were entitled to a temporary injunction pending appeal, it has no application here where the only issue is whether a remedy is available to appellants in the courts of Ohio sufficient under 28 U.S.C. Sec. 1341 to deprive the District Court of jurisdiction of this action to enjoin an Ohio tax on the ground of unconstitutionality. In that case the Bethlehem Corp. was seeking to enjoin the National Labor Relations Board from holding "a hearing for the purpose of determining whether or not [Bethlehem Corp.] has engaged at its Fore River Plant in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever, at any time or times, with respect thereto" (303 U.S. at 46). Bethlehem Corp. contended primarily that it was not engaged in interstate or foreign commerce and that therefore it was not subject to the jurisdiction of the Board.[1] This Court held that the power to prevent unfair practices affecting commerce had been vested by Congress in the N.L.R.B. and the Circuit Court of Appeals, so that the District Court was without jurisdiction. To the further contention of Bethlehem that the hearing to establish that its business did not involve interstate or foreign commerce would subject it to irreparable damage, this Court replied that this contention could not be used to circumvent the requirement of the exhaustion of the administrative remedy.

In the *Petroleum Exploration* case the plaintiff sought to enjoin the Public Service Commission of Kentucky from

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[1] Bethlehem's complaint also challenged the constitutionality of the National Labor Relations Act (see 88 F. 2d at 155 and 303 U.S. at 46), but this contention was not discussed in the opinion, possibly because (as this Court pointed out, 303 U.S. at 52) the constitutionality of the Act had already been sustained in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1.

prosecuting an investigation of rates for gas marketed by it under contract in Kentucky, the asserted ground for relief being that Petroleum was a not a public utility and therefore the regulation of its rates was beyond the statutory power of the Commission. This Court held, *inter alia*, that there was equitable jurisdiction to enjoin the proposed investigation if the order to show cause carried a threat of imminent, irreparable injury, but that the allegations as to the cost of preparing for the hearing did not present the sort of irreparable injury against which equity protects.

Thus, the factual situations in the *Myers* and *Petroleum* cases are entirely different from the situation presented here. In both those cases the plaintiff was confronted with only an administrative investigation, and the suit was brought in an effort to avoid the investigation. In both cases this Court held that the expense, inconvenience, loss of good will, etc., attendant on preparing for and meeting the investigation did not justify interference by a federal equity court with this state administrative proceeding (303 U.S. at 47-48; 304 U.S. at 220-221), with the additional factor in the *Myers* case that Congress had vested exclusive jurisdiction of the subject-matter in the N.L.R.B. and the Circuit Court of Appeals (303 U.S. at 48-49). In each of these cases the jurisdiction of the administrative agency over the complaining party depended on the existence of a fact which was within the province of the administrative agency to determine, i.e., whether the N.L.R.B. complaint concerned interstate or foreign commerce (*Myers*, 303 U.S. at 49), and whether the company was a public utility (*Petroleum*, 304 U.S. at 211). In neither case could it be determined before the administrative investigation was completed whether the complaining party's interests would be affected; in each case the compulsory and punitive powers of the administrative agency were exercised only through the courts (303 U.S. at 48-49; 304 U.S. 219, 223).

The situation here is in sharp contrast to that in the *Myers* and *Petroleum* cases. Here a tax is levied by a

state statute, and the statute fixes the rate. If, as appellants contend, that rate is excessive and discriminatory and therefore unconstitutional, the vice is in the statute itself. *This situation was not created by anything which the state administrative agencies did, nor can it be changed by anything they can do in the future. The basic issue of constitutionality is outside their jurisdiction. The issue on this appeal, then, is whether the right to a hearing before these administrative forums impotent to grant the relief sought is sufficient under Section 1341 to deprive the District Court of jurisdiction which admittedly it otherwise has.* We submit that Circuit Judge Allen, the dissenting member of the three-judge District Court, answered this question correctly in holding that "there is not a plain, speedy and efficient remedy in the courts of the State of Ohio."

IV. The issue presented here has not been decided in any of the previous cases coming to this Court from Ohio involving Ohio taxes.

Appellees contend that the administrative procedure here involved is the general tax appeal procedure under the Ohio law, and that this procedure has brought other cases to this Court in which "this Court has apparently found the machinery adequate to present the issues involved." The cases cited and the issues which they involved are as follows:

Standard Oil Co. v. *Peck*, 342 U.S. 382—In the notice of appeal from the reassessment of the Tax Commissioner to the Board of Tax Appeals there were 13 assignments of error challenging the rulings of the Tax Commissioner on a variety of factual questions. Assignment 2 was that the Tax Commissioner erred in failing to eliminate from appellant's 1945 personal property tax assessment certain towboats and barges and "in holding that said boats and barges were taxable in Ohio" (No. 184, October Term 1951, Record 45-46). These boats and barges were being operated on the Ohio and Mississippi Rivers. No question

was raised as to the constitutionality of any state statute.

Wheeling Steel Corp. v. *Glander*, 337 U.S. 562—The general question here was the taxable situs of accounts receivable and other intangible property. The Tax Commissioner's opinion showed that the validity of the assessment was contested on the grounds that Section 5328-2, General Code of Ohio, was not applicable and that "the construction of Section 5328-1 and Section 5328-2, General Code, adopted by the Tax Commissioner, is in violation of the Fourteenth amendment to the Constitution of the United States and the Constitution of the State of Ohio for as construed, such sections operate to tax intangible property of a nonresident over which Ohio has no jurisdiction and which has no business situs in Ohio" (No. 447, October Term 1948, Record 34, 57-58). Even in the *per curiam* opinion of the Supreme Court of Ohio it appears that the attack of the company was on "this interpretation of Section 5328-2 * * *" (*Ibid.*, Record 20). It therefore appears that at the time this litigation was instituted the principal complaint of the company was that the Tax Commissioner was not properly construing and applying the Ohio law.

Harvester Co. v. *Evatt*, 329 U.S. 416—The question here was whether the use by the Tax Commissioner, in applying to the company's business the statutory formula for determining the amount and value of Ohio manufacturing and sales, as distinguished from interstate and out-of-state sales, of the sales proceeds of goods manufactured in Ohio and sold elsewhere and of goods manufactured elsewhere and sold in Ohio, violated the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Federal Constitution. The constitutional issue arose because of the inclusion by the Tax Commissioner of these challenged amounts in applying the tax formula.

Hooven & Allison Co. v. *Evatt*, 324 U.S. 652—The question here was whether Hooven & Allison was the importer of certain fibers and, if so, whether these fibers in their hands, stored in the original packages preliminary to their use, were subject to a state ad valorem tax. Clearly these

factual issues had to be decided before one could tell whether a constitutional issue was raised.

None of the foregoing cases is applicable here, for in each of them what was challenged was the action of the Tax Commissioner and the Board of Tax Appeals in the performance of a legislative function. In the present case appellants are attacking the right of the Tax Commissioner and the Board of Tax Appeals to act under the challenged law because of the alleged unconstitutionality thereof, as well as their absolute lack of authority to act in passing upon the question as to the constitutionality of said law.

Moreover, none of the litigants in the above-mentioned cases made any effort to have its cause heard in the Federal District Court, so that none of those decisions deals with the question whether this state administrative procedure is "a plain, speedy and efficient remedy * * * in the courts" of Ohio within the meaning of Section 1341.

Appellees' suggestion that "this Court has apparently found the [state administrative] machinery adequate to present the issues involved" in the above-mentioned cases is misleading. The question here is whether that machinery provides a "remedy" which is "plain, speedy and efficient." The reason why this machinery is ineffective and inefficient in presenting constitutional issues is demonstrated in the records of at least two of those cases. Where constitutional arguments were touched on in the presentation of the *Wheeling Steel* case the Tax Commissioner expressly disavowed authority to decide them, and in that case and in the *Standard Oil* case the Board of Tax Appeals did likewise, citing as authority for its position the opinion of this Court in *Hillsborough* v. *Cromwell*, 326 U. S. 620 (*Wheeling Steel Corp.* v. *Glander*, October Term 1948, No. 447, Record 34, 57-58, 71; *Standard Oil Co.* v. *Peck*, October Term 1951, No. 184, Record 18).

We point out in passing that appellees have apparently misconstrued our reference to the provision in the Ohio Constitution limiting the power of the Supreme Court of that State to declare a law unconstitutional. We are not, as appellees seem to think, seeking to raise on this appeal the question whether that provision in the Ohio Constitution is a denial of due process where the question of the constitutionality of the statute under attack must first be raised before an administrative tribunal without jurisdiction or authority to decide it. Instead, we are merely calling attention to the fact that this issue as to the denial of due process will be raised if we are compelled to follow the administrative procedure forced on us by the decision below.

CONCLUSION

For the foregoing additional reasons, we respectfully submit that the question presented on this appeal is substantial, that the judgment of the District Court should be reversed, and that the cause should be remanded for the consideration of appellants' complaint on its merits.

Respectfully submitted,

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